

# EU Law and Politics: the Rule of Law Framework

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György Schöpflin So 28 Feb 2016

The Commission's new rule of law mechanism, called a "[Framework](#)", was communicated to the EU Council on the 11 March 2014 and attracted next to no attention until now. The date is not entirely insignificant – it was issued just before the 2014 elections to the European Parliament and largely escaped notice. At first sight, what is equally difficult to explain is why the Framework never emerged in the context of Hungary, long a *bête noire* of the Western left and the object of several infringement procedures launched by the Commission.

Last December, when the legal affairs commissioner, Věra Jourová, concluded the plenary debate on Hungary, she mentioned the Framework, but [stated](#), "The Commission has at this stage not activated the Rule of Law Framework as regards Hungary." And then added, "Considering that concerns about the situation in Hungary are being addressed by a range of infringement procedures and pre-infringement procedures, and that also the Hungarian justice system has a role to play, the Commission takes the view that the conditions to activate the Rule of Law Framework regarding Hungary are at this stage not met."

So, somewhat to the irritation of some (leftwing) MEPs, the Commission's view of Hungary was fairly emollient – whenever problems arose, she argued in effect, these were sorted out through dialogue with the Hungarian government. For what it's worth, the Framework was never brought up in Parliament's Constitutional Affairs committee either.

The core of the Framework is that action must be taken if, in the Commission's view, there is systemic risk to the rule of law in a member state, stress being on systemic, meaning that one-off breaches are not relevant. The definition of systemic is in the hands of the Commission.

The procedure itself establishes four principles for action – dialogue, an assessment of what is actually happening in the member state, equal treatment of all member states and concrete action to remedy the situation in order to avoid an Article 7 process. Only if it thinks that there does actually exist a systemic risk, "the Commission will assess the possibility of activating one of the mechanisms set out in Article 7".

Much of the media and political comment has sought to establish a kind of twinning between Hungary and Poland, that the latter was simply following the (bad) example of the former – a kind of liberal guilt by association maybe. So the question then arises, why be fairly emollient with Hungary, but to reach for the Framework in the case of Poland?

There are no convincing answers. Legally, there are some differences between the two countries, even if politically they are widely seen as alike. But based on precedent, dialogue and possibly infringement procedures ought to have been enough when dealing with Poland. Instead, the activation of Framework indicates that one legal procedure has been replaced by another, but this time political, action – again it's unclear why.

The proposition that there is a political element involved is underscored by the fact that the Polish government had asked the Venice Commission for legal advice. The Commission chose not to wait for that to arrive.

The situation was made hazier yet by diverging reports on what the College of Commissioners actually decided. According to some reports, there was a decision by the College not to launch the Framework, but to establish the facts of what has happened in Poland first. This was not what was announced at the press conference that followed, on the contrary.

Certainly, the Juncker Commission declared itself to be a political one, so politics appears to have primacy over legal procedures. If so, a political assessment of the decision is more than justified. And that assessment has to begin from the Commission being the guardian of Treaties – even if a political guardian is something new.

All this is odd, just the same. It's common ground that one of the most sensitive areas of activity in the public

sphere is where law and politics meet. The Commission has been particularly insistent that its actions are governed by law. Anything else would obviously be arbitrary and destructive. This seems to be especially clear-cut when questions of the rule of law are on the agenda.

So the oddity is that what we have is a rule of law mechanism, the Framework, being employed for political purposes. This bodes ill for the future, because it will generate resistance, erode respect for the rule of law and provide fuel for Eurosceptics, and that would seem to be completely counter-productive from the Commission's standpoint.

This prioritisation of politics over law in the relationship between the Commission and a member state has already arisen once, last November to be precise, when the Commission gave the go-ahead to a European Citizens' Initiative (ECI) aimed at triggering an Article 7 procedure against Hungary.

Article 7, as everyone knows by now or should, is a long, slow, laborious process at the end of which a sinful member state is deprived of its voting rights. To get there, it has to be determined that there is "a clear risk of a serious breach by a Member State" of the principles laid out in Article 2 of the Treaty. Article 7 lays down three steps. In the first instance, starting from "a reasoned proposal" by one third of the member states or by the Commission or by the European Parliament, there has to be a decision by a four-fifths majority in Council that there is a risk of a serious breach. The second step requires a decision by unanimity and the consent of the European Parliament. After this, Council can act by a qualified majority. So the demand made by an ECI to launch an Article 7 procedure seems unlikely to succeed, given the hurdles.

Now it so happens that I am well versed in the world of the ECI, having been Parliament's rapporteur on the instrument. There is no question that hitherto the Commission has been extremely cautious in accepting ECIs, and cautious is an understatement. Then, ECIs are there to impel the Commission to formulate legislation on some issue of general EU concern. The [Right to Water \(R2W\) initiative](#) is a good example.

Yet out of nothing, the Commission accepted the ECI launched by [Wake up Europe](#), namely "We call on the EU to go further and trigger the procedure laid out in the Treaty of European Union (Article 7) to check whether the Orbán government policies and legislative changes respect European values."

I cannot in any way see what this has to do with formulating legislation, implying that the Commission accepted the Wake up Europe initiative for political reasons, as a move against Hungary. My guess is, by the way, that the initiative will fail in that it is unlikely to mobilise one million signatures by next November (within one year) and if it does, it will be taken to the Luxembourg Court (the ECJ) by the Hungarian government. Law and politics meet again, and it's not a very happy get-together.

There is worse to come, though. There are grave doubts about the Commission's Framework having any legal basis at all. In May 2014, the legal service of Council explicitly and emphatically [announced](#) that "there is no legal basis in the Treaties empowering the institutions [of the EU] to create a new supervision mechanism of the respect of the rule of law by the Member States", other than what is prescribed in Article 7. Council's legal service then goes on to suggest that a Member State peer review of the rule of law could be compatible with the Treaties.

To complicate matters further in the area of rule of law breaches, Council did agree to something like the suggested peer review and holds regular "conversations" on the topic. At the same time, the European Parliament has also embarked on establishing a rule of law mechanism, which is likely to be voted on in July this year. How these three separate instruments will be synchronised is unclear and, quite apart from anything, none of them will have a legal basis unless and until there is treaty change.

Treaty change, however, has become one of the most difficult of exercises in the EU. The Lisbon Treaty evidently can't be the last such EU treaty, but treaty revision is necessarily an extended process. It requires the calling of a Convention, and it will be politically impossible to limit the agenda to one or two issues. Once a draft is agreed, it must then be accepted by the European Council and then goes for ratification to all the member states (around 40 chambers, minus two if the UK leaves) and by the European Parliament. Referenda are legally obligatory in the Irish Republic and politically so in several other member states. There is no guarantee that

these referenda will approve the putative new treaty if the 2005 precedents are anything to go by, when French and Dutch voters rejected the Constitutional Treaty agreed at the previous Convention. It is no surprise that most Brussels insiders blench at the mention of treaty change.

One could go on speculating as to what is really going on currently. Steps have been taken by the Commission to secure the health of the rule of law in Poland, yet this has been done in a non-legal way – there would seem to be quite a contradiction here. The legal and political factors should clearly be separate, yet appear to be intertwined and that augurs badly, in that it could generate confusion and potentially introduce political criteria in the assessment of breaches of the rule of law.

At the same time, media reporting of the Framework, Poland, Hungary and all has been superficial and partisan, to put it mildly. Is it conceivable that the Commission decided to use the Framework in the case of Poland because of pressure by the media and, maybe, some member states?

Then, from the Central European perspective, many will conclude that the EU is picking on Poland and Hungary and that, in turn, does nothing to strengthen the credibility or the neutrality of the EU. In this context, it would really help if the Commission were to place one of the Western states in the cross-hairs of the Framework – there are skeletons everywhere, after all.

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